Supreme Court, U.S.
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Nº. _____

In The Supreme Court of the United States

ALEXANDER GRIGORIEVICH URITSKY,
Petitioner,
v.
ALBERTO GONZALES, ATTORNEY GENERAL,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI
with Appendix

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June, 2005

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QUESTIONS PRESENTED FOR REVIEW

1 Whether the Sixth Circuit and Board of Immigration Appeals erred as a matter of law and violated longstanding federal and agency precedent in holding that an adjudication under Michigan's youthful trainee statute constitutes a conviction for immigration purposes under 8 U.S.C. § 1101(a)(48)(A).

2. Whether the uniform application of immigration laws, Equal Protection, and the rule of lenity require reversal of the Sixth Circuit's decision finding that an adjudication under Michigan's youthful trainee statute constitutes a conviction for immigration purposes under 8 U.S.C. § 1101(a)(48)(A).

TABLE OF CONTENTS

Pages

Questions Presented i

Table of Contents ii

Table of Authorities iii

Opinions Below 1

Jurisdiction 1

Relevant Provisions Involved 2

Statement 5

Reasons For Granting The Writ 10

Conclusion 22

Appendix:

A - Circuit Court Opinion (3/7/05) A1

B - Decision of the Board of Immigration Appeals (10/6/03) B1

C - Decision of the Immigration Judge (4/3/03) C1

TABLE OF AUTHORITIES

Table of Cases **Pages**

Chery v. Ashcroft, 347 F.3d 404
(2d Cir. 2003) 11

Costello v. INS, 376 U.S. 120,
84 S. Ct. 580, 11 L. Ed. 559 (1964) 20

Dillingham v. INS, 267 F.3d 996
(9th Cir. 2001) 19

Fong Haw Tan v. Phelan, 333 U.S. 6,
68 S. Ct. 374, 92 L. Ed. 433 (1948) 20

Gerbier v. Holmes, 280 F.3d 297
(3rd Cir. 2002) 18-19

INS v. Errico, 385 U.S. 214, 87 S. Ct. 473,
17 L. Ed. 2d 318 (1966) 21

INS v. St. Cyr, 533 U.S. 289, 121 S. Ct. 2271,
150 L. Ed. 2d 347 (2001) 21

Leocal v. Ashcroft, 543 U.S. __, 125 S. Ct. 377,
160 L. Ed. 2d 271 (2004) 8, 10, 21

Matter of C-M-, 5 I. & N.
Dec. 327 (BIA 1953).....12

Matter of Chartier, 16 I. & N.
Dec. 284 (BIA 1977) 21

Matter of De La Nues, 18 I. & N.
Dec. 140 (BIA 1981) 12, 14

Matter of Devison, 22 I. & N.
Dec. 1362 (BIA 2000, 2001) 7, 12-18

Matter of Farias-Mendoza, 21 I. & N.
Dec. 269 (BIA 1996)..... 21

Matter of G-, 9 I. & N.
Dec. 159 (BIA 1960) 21

Matter of Ozkok, 13 I. & N.
Dec. 546 (BIA 1988) 11

Matter of Rodriguez-Rodriguez, 22 I. & N.
Dec. 991 (BIA 1999)..... 14

Matter of Roldan, 22 I. & N.
Dec. 512 (BIA 1999)..... 12, 17

Patel v. Ashcroft, 401 F.3d 400
(6th Cir. 2005) 11

People v. Minott, 99 N.Y. Int. 0143
(N.Y. 10/21/1999) 16

Rosario v. INS, 962 F.2d 220
(2nd Cir. 1992) 19

United States v. LeBlanc, 612 F.2d 1012
(6th Cir. 1980) 16

Uritsky v. Gonzales, 399 F.3d 728
(6th Cir. 2005) 1, 10, 17, 18

Uritsky v. Ridge, 286 F. Supp. 2d 842
(E.D. Mich. 2003) 7

Ye v. INS, 214 F.3d 1128 (9th Cir. 2000) 18

Constitutional Provisions

U.S. Const. Art. I, § 8..... 18

Statutes

8 U.S.C. § 1101(a)(43)(A) 7

8 U.S.C. § 1101(a)(48)(A) 2, 5, 11, 12

8 U.S.C. § 1227(a)(2)(A)(iii) 6

8 U.S.C. § 1229a(c)(3)(A) 10

8 U.S.C. § 1229a(c)(3)(B) 10

8 U.S.C. § 1252 8

8 U.S.C. § 1252(b)(2) 9

18 U.S.C. § 5031 ..... 7, 13, 16

18 U.S.C. § 5032 13

Mich. Comp. Laws § 750.520d(1)(A) 6, 8

Mich. Comp. Laws § 762.11 ..... 6, 15

Mich. Comp. Laws § 762.11(1) 2

Mich. Comp. Laws § 762.12 ..... 3, 16

Mich. Comp. Laws § 762.14 4

Mich. Comp. Laws § 762.14(1) 16

Mich. Comp. Laws § 762.14(2) 16

Mich. Comp. Laws § 762.14(4) 16

N.Y. Crim. Proc. Law § 410.70(5) 16

N.Y. Crim. Pro. Law § 720.10(2) 15

N.Y. Crim. Pro. Law § 720.10(4) 15

N.Y. Crim. Proc. Law § 720.15(1) 16

N.Y. Crim. Proc. Law § 720.15(3) 16

N.Y. Crim. Pro. Law § 720.20(3) 15

Other Authorities

Illegal Immigration Reform and Immigrant Responsibility Act of 1996 § 322(a)(1) 11, 17

Pub. L. No. 104-208, 110 Stat. 3009 11

Pub. L. No. 107-296, 116 Stat. 2135 6

PETITION FOR WRIT OF CERTIORARI

Petitioner Alexander Grigorievich Uritsky respectfully prays that a writ of certiorari issue to review the opinion of the United States Court of Appeals for the Sixth Circuit entered in this case on March 7, 2005.

OPINIONS BELOW

The opinion of the Immigration Judge (App. C1 hereto) is unreported. The opinion of the Board of Immigration Appeals (App. B1 hereto) is unreported. The opinion of the Sixth Circuit Court of Appeals on the merits (App. A1 hereto), of which review is sought, is reported at Uritsky v. Gonzales, 399 F.3d 728 (6th Cir. 2005).

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit (App. A1) was entered on March 7, 2005. The jurisdiction of the Supreme Court is invoked under Supreme Court Rule 10(a), in that the Sixth Circuit has entered a decision in conflict with decisions of other United States courts of appeal on the same important matter and has sanctioned a decision of the Board of Immigration Appeals that has so far departed from the accepted and

usual course of proceedings, as to call for an exercise of this Court's supervisory power.

RELEVANT PROVISIONS INVOLVED

8 U.S.C. § 1101(a)(48)(A) provides:

> (A) The term "conviction" means, with respect to an alien, a formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where--
>
> (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and
>
> (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed.

Mich. Comp. Laws § 762.11(1) provides:

> (1) Except as provided in subsections (2) and (3), if an individual pleads guilty to a criminal offense, committed on or after the individual's seventeenth birthday but before his or her twenty-first birthday, the court of record having jurisdiction of the criminal

offense may, without entering a judgment of conviction and with the consent of that individual, consider and assign that individual to the status of youthful trainee.

Mich. Comp. Laws § 762.12 provides:

The court of record having jurisdiction over the criminal offense referred to in section 11 of this chapter may, at any time, terminate its consideration of the individual as a youthful trainee or, once having assigned the individual to the status of a youthful trainee, may at its discretion revoke that status any time before the individual's final release. If an individual who is required to be registered pursuant to the sex offenders registration act willfully violates that act, the court shall revoke the individual's status as a youthful trainee. Upon termination of consideration or revocation of status as a youthful trainee, the court may enter an adjudication of guilt and proceed as provided by law. If the status of youthful trainee is revoked, an adjudication of guilt is entered, and a sentence is imposed, the court

in imposing sentence shall specifically grant credit against the sentence for time served as a youthful trainee in an institutional facility of the department of corrections or in a county jail.

Mich. Comp. Laws § 762.14 provides:

(1) If consideration of an individual as a youthful trainee is not terminated and the status of youthful trainee is not revoked as provided in section 12 of this chapter, upon final release of the individual from the status as youthful trainee, the court shall discharge the individual and dismiss the proceedings.

(2) An assignment of an individual to the status of youthful trainee as provided in this chapter is not a conviction for a crime and, except as provided in subsection (3), the individual assigned to the status of youthful trainee shall not suffer a civil disability or loss of right or privilege following his or her release from that status because of his or her assignment as a youthful trainee.

(3) An individual assigned to youthful trainee status before October 1, 2004 for a

listed offense enumerated in section 2 of the sex offenders registration act, 1994 PA 295, MCL 28.722, is required to comply with the requirements of that act.
(4) Unless the court enters a judgment of conviction against the individual for the criminal offense under section 12 of this chapter, all proceedings regarding the disposition of the criminal charge and the individual's assignment as youthful trainee shall be closed to public inspection, but shall be open to the courts of this state, the department of corrections, the family independence agency, law enforcement personnel and, beginning January 1, 2005, prosecuting attorneys for use only in the performance of their duties.

STATEMENT

(i) Nature of the Case

This is a petition for review of the decisions of the Board of Immigration Appeals ("BIA"), and the Sixth Circuit Court of Appeals finding that assignment to youthful trainee status under Michigan's Holmes Youthful

Trainee Act constitutes a conviction under immigration law, 8 U.S.C. § 1101(a)(48)(A). Longstanding federal and agency precedent have held that juvenile adjudications are not "convictions" under immigration law.

(ii) Proceedings at the Immigration Court

Mr. Alexander Uritsky, at the age of 11, was admitted to the United States on April 21, 1996 as an H-4 nonimmigrant. On January 4, 2002, he adjusted his status to that of a lawful permanent resident. On September 24, 2002, a Michigan trial court assigned Mr. Uritsky to youthful trainee status under the Holmes Youthful Trainee Act ("HYTA"), Mich. Comp. Laws § 762.11, based on his plea of guilty to third degree sexual conduct in violation of Mich. Comp. Laws § 750.520d(1)(A).[1]

On September 24, 2002 the Immigration and Naturalization Service ("INS")[2] placed him in removal

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[1] Mich. Comp. Laws § 750.520d(1)(A) prohibits the sexual penetration of another person who is between the ages of 13 and 16 years old.

[2] The Homeland Security Act abolished the INS effective March 1, 2003 and transferred its functions to various agencies within the Department of Homeland Security. Pub. L. No. 107-296, 116 Stat. 2135, 2192. The BIA and the Immigration Court remain part of the Department of Justice. This petition refers to the INS with respect to actions it took during its existence and to the appropriate agencies for events occurring after March 1, 2003.

proceedings in Immigration Court. The INS alleged that he was removable under 8 U.S.C. § 1227(a)(2)(A)(iii) as an alien convicted of an aggravated felony under 8 U.S.C. § 1101(a)(43)(A).

On April 3, 2003, in response to Mr. Uritsky's motion, the Immigration Judge ("IJ") terminated the removal proceedings based on his finding that assignment to youthful trainee status under the HYTA is not a conviction pursuant to the decision in Matter of Devison, 22 I. & N. Dec. 1362 (BIA 2000, 2001). App. C1.

(iii) Proceedings at the Board of Immigration Appeals

The Department of Homeland Security ("DHS") filed a timely appeal from the IJ's decision. While on appeal, Mr. Uritsky was released from custody after the District Court granted his petition for writ of habeas corpus. See Uritsky v. Ridge, 286 F. Supp. 2d 842 (E.D. Mich. 2003).

On October 6, 2003, the BIA sustained the DHS's appeal and ordered Mr. Uritsky removed. The BIA distinguished the HYTA from the statutes analyzed in Devison, *supra*. In Devison, the BIA found New York's youthful offender provisions "sufficiently analogous" to the Federal Juvenile Delinquency Act ("FJDA"), 18 U.S.C. § 5031. 22 I. & N. Dec. at 1367. According to the BIA, the HYTA differs from the New York and federal statutes

because Michigan requires a youthful offender to enter a guilty plea before being assigned to youthful trainee status. The BIA found Mr. Uritsky removable as an aggravated felon. App. B1.

(iv) Statement of Facts

Mr. Uritsky is a 20-year-old native of Ukraine and citizen of Israel. When he was 11-years-old, he and his family were admitted to the United States as nonimmigrants. On January 4, 2002, he they adjusted their status to that of lawful permanent residents.

When he was 17, he had sexual intercourse with a 14-year-old girl. He pleaded guilty to third degree sexual conduct, in violation of Mich. Comp. Laws § 750.520d(1)(A), and was assigned to youthful trainee status under the HYTA on September 24, 2002. Michigan did not enter a finding of guilt or conviction. The court sentenced him to complete two years probation and pay fines, costs, and fees, all of which he has fully complied with.

(v) Statement of Court of Appeals and Supreme Court Jurisdiction

Jurisdiction in the Sixth Circuit Court of Appeals was proper. 8 U.S.C. § 1252; Leocal v. Ashcroft, 543 U.S. __, 125 S. Ct. 377, 160 L. Ed. 2d 271 (2004). Venue was

proper in the Sixth Circuit because an IJ sitting in Detroit, Michigan completed the Immigration Court proceedings. 8 U.S.C. § 1252(b)(2).

Petitioner invokes the jurisdiction of this Court on application for writ of certiorari under Supreme Court Rule 10(a), in that the Sixth Circuit has entered a decision in conflict with decisions of other United States courts of appeal on the same important matter and has sanctioned a decision of the BIA that has so far departed from the accepted and usual course of proceedings, as to call for an exercise of this Court's supervisory power.

REASONS FOR GRANTING THE WRIT

I. Assignment to Youthful Trainee Status Under Michigan's HYTA Falls Outside Immigration Law's Definition of "Conviction"

Mr. Uritsky's assignment to youthful trainee status is not a conviction under immigration law. The BIA and Sixth Circuit ignored longstanding precedent decisions making juvenile adjudications an exception to the statutory definition of "conviction." For over fifty years, the BIA has consistently carved out an exception to the statutory definition of conviction for alien offenders adjudicated under state or federal youthful offender programs. The DHS cannot meet its burden of proving by clear and convincing evidence that Mr. Uritsky was convicted of a crime. 8 U.S.C. §§ 1229a(c)(3)(A), (B).

The Sixth Circuit granted undue deference to the BIA's interpretation of Michigan's HYTA. Uritsky, 399 F.3d at 734. The question of whether an alien has been "convicted," as defined by immigration law, is a non-discretionary, purely legal question and, as such, the BIA's conclusions are reviewed de novo. See Leocal, 125 S. Ct. 377 at 380-81. Given that the BIA's ultimate conclusion in this case depends upon the agency's interpretation of state

and federal statutes unrelated to immigration law and for which it has no expertise in administering, the Sixth Circuit should not have deferred to the BIA's analysis. See Patel v. Ashcroft, 401 F.3d 400, 407 (6th Cir. 2005); Chery v. Ashcroft, 347 F.3d 404, 407 (2d Cir. 2003).

A. Statutory Definition of Conviction

In 1996, Congress amended the Immigration and Nationality Act's definition of the term "conviction," now found at 8 U.S.C. § 1101(a)(48)(A). Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 ("IIRIRA") § 322(a)(1). Prior to IIRIRA, the BIA employed an unwieldy three-pronged definition of conviction: (1) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contender or has admitted sufficient facts to warrant a finding of guilt; (2) the judge has ordered the imposition of some form of punishment, penalty, or restraint on the alien's liberty; and (3) a judgment or adjudication of guilt may be entered if the alien violates the terms of his or her probation or fails to comply with the requirements of the court's order, without availability of further proceedings requiring the alien's guilt or innocence of the original charge. See Matter of Ozkok, 13 I. & N. Dec. 546 (BIA 1988).

Through IIRIRA, Congress eliminated the third prong of this definition so that it now requires (1) a judge or jury to find the alien guilty or where the alien has entered a plea of guilty or nolo contender or has admitted sufficient facts to warrant a finding of guilty; and (2) a judge to order some form of punishment, penalty, or restraint on the alien's liberty. 8 U.S.C. § 1101(a)(48)(A). This amended definition eliminated the disparate treatment under immigration law under which aliens faced different immigration consequences depending on whether they were convicted in a state that uses "deferred adjudications" or expungements. Matter of Roldan, 22 I. & N. Dec. 512, 521 (BIA 1999).

B. The Amended Definition of Conviction Left Untouched BIA Precedents Treating Distinguishing Juvenile Adjudications from Convictions

The BIA has consistently distinguished between juvenile delinquency and criminal proceedings. Devison, 22 I. & N. Dec. at 1365; see also Matter of De La Nues, 18 I. & N. Dec. 140 (BIA 1981); Matter of C-M-, 5 I. & N. Dec. 327, 329 (BIA 1953). Following IIRIRA's amendment to the meaning of "conviction," the BIA once again faced the question of whether state juvenile

adjudications constitute convictions under immigration law. In a published unanimous en banc decision, the BIA again answered the question in the negative. Devison, *supra*. In a subsequent unanimous en banc decision, the BIA denied the INS's motion for reconsideration. Devison, 22 I. & N. Dec. at 1374. Congress was presumably aware of the fifty years of BIA precedents on the issue yet there is no record of an effort or intention to include juvenile adjudications within the definition of "conviction." Id. at 1369.

The key factor is that youthful offender statutes are premised on the offender's status, not his or her guilt or conduct. Id. at 1368. With respect to youthful offenders, there is no conviction in the first place and disposition rests on the youthful offender's status as a youth as opposed to his or her conduct. Id. at 1368, 1371. Juvenile delinquency and youthful offender adjudications differ from expungements or deferred adjudications because in the latter cases, the offender is convicted only to have his or her conviction erased based on post-conviction conduct. Devison, 22 I. & N. Dec. at 1371.

Following federal precedent, the BIA recognizes that the FJDA results in an adjudication of status, not a criminal conviction. 18 U.S.C. §§ 5031, 5032. State youthful offender statutes need only be "sufficiently

analogous" to the FJDA. Devison, 22 I. & N. Dec. at 1367; De La Nues, 18 I. & N. Dec. 140; Matter of Rodriguez-Rodriguez, 22 I. & N. Dec. 991 (BIA 1999).

Devison involved a youthful offender adjudication under New York law. There are several important difference between the New York and federal statutory schemes: under the state statute, a youth must be less than 19 years of age as opposed to 18 in the federal system; New York first enters a conviction and only vacates the conviction after adjudication as a youthful offender while the federal system adjudicates the offender's status first. 22 I. & N. Dec. at 1368.

Nevertheless, the two statutes are analogous because "the central issued before both the state and federal courts is the offender's status, not his guilt or innocence." Id. Under both schemes, the court records are confidential and the adjudication does not constitute a conviction. Id. at 1367-68. Even if a beneficiary of New York's youthful offender scheme violates his or her probation and is then resentenced, the adjudication is not treated as a conviction under immigration law. Id. at 1373.

C. Michigan's HYTA is Sufficiently Analogous to the FJDA

Michigan's HYTA statute has more in common with the FJDA than does the New York statute. The HYTA is "similar in nature and purpose" to the FJDA. See Devison, 22 I. & N. Dec. at 1377.

An offender seeking assignment to youthful trainee status enters a plea of guilty as a condition for such assignment. Mich. Comp. Laws § 762.11. Unlike New York's procedures, the HYTA directs the state court to *not* enter a judgment of conviction. *Compare* Mich. Comp. Laws § 762.11 *with* N.Y. Crim. Pro. Law §§ 720.10(4), .20(3). Under the FJDA, as in Michigan, the court first adjudicates the offender's status and then initiates the appropriate procedures. See Devison, 22 I. & N. Dec. at 1368. In other words, under the HYTA and the FJDA, the court never enters a conviction whereas in New York, the court enters, and then vacates, a conviction.

Michigan law applies to certain crimes committed by "youths" between the ages of 17 and 20. Mich. Comp. Laws § 762.11. New York law applies to certain crimes committed by "youths" between the ages of 16 and 19. N.Y. Crim. Pro. Law § 720.10(2). The FJDA applies to

anyone under the age of 21 who committed an offense before reaching 18 years of age. 18 U.S.C. § 5031.

Both Michigan and New York seal these court records, with only limited exceptions. Mich. Comp. Laws § 762.14(4); N.Y. Crim. Proc. Law §§ 720.15(1), (3).

In New York, if an individual placed on youthful offender status violates the conditions of his probation, the state court can vacate the sentence and resentence him as an adult. See Devison, 22 I. & N. Dec. at 1373; see also People v. Minott, 99 N.Y. Int. 0143 (N.Y. 10/21/1999); N.Y. Crim. Proc. Law § 410.70(5). In Michigan, if a youthful trainee violates the terms of his supervision, the court "may" impose a sentence. Mich. Comp. Laws § 762.12.

At the conclusion of the HYTA proceedings, the Michigan court releases the offender from youthful trainee status, discharges the offender, and dismisses the proceedings. Mich. Comp. Laws § 762.14(1). Assignment to youthful trainee status is not a conviction and does not result in a civil disability or loss of a right or privilege. Mich. Comp. Laws § 762.14(2); United States v. LeBlanc, 612 F.2d 1012, 1013 (6th Cir. 1980). As with the FJDA, the pivotal quality of the HYTA is that it prevents the entry of a conviction. Devison, 22 I. & N. Dec. at 1376.

The HYTA is "similar in nature and purpose" to the FJDA. Id. at 1377; Uritsky, 399 F.3d at 734. As with the FJDA and New York law, the HYTA focuses on the offender's status as a youth, not his or her guilt or conduct.

II. Uniform Application of the Immigration Laws, Equal Protection, and the Principle of Narrow Construction Dictates that HYTA Adjudications are not Convictions under Immigration Law

The Sixth Circuit's decision violates three deeply held principles of immigration law. Congress has long sought nationwide uniformity in the application of immigration laws as they apply to criminal aliens. The principle of narrow construction and Equal Protection require that courts resolve any doubts in the aliens' favor.

In amending the definition of conviction in IIRIRA § 322(a)(1), Congress sought to achieve a uniform federal approach. Roldan, 22 I. & N. Dec. at 517. Under the pre-IIRIRA definition, the question of whether an alien was "convicted" often turned on the vagaries of differing state laws and procedures. Id. at 521. Aliens should not be punished for being unfortunate enough to have committed a crime in a state whose youthful offender procedures lack the right combination of words. See id.

In Devison, the BIA relied on the goal of national uniformity to find New York's procedures to be sufficiently analogous to the FJDA so as to fall within the exception to the definition of "conviction." Devison, 22 I. & N. Dec. at 1371. The BIA sought to "faithfully apply the new statutory definition in a manner that will be consistent across state lines." Id. Yet a few short years later, the BIA violated this principle by finding that Michigan's HYTA procedures result in a "conviction" despite its similarity in purpose and nature to the FJDA. See Uritsky, 399 F.3d at 734. The Sixth Circuit recognized that the line drawn by the BIA between HYTA and New York's statutes "may seem to some to be less than compelling." Id.

There is a "strong interest in national uniformity in the administration of immigration laws." Gerbier v. Holmes, 280 F.3d 297, 311 (3rd Cir. 2002). This policy of uniformity is rooted in the Constitution, which grants Congress the power to "establish a uniform Rule of Naturalization." U.S. Const. art. I, § 8. Immigration laws "should be applied uniformly across the country, without regard to the nuances of state law." Ye v. INS, 214 F.3d 1128, 1132 (9th Cir. 2000). The immigration laws were "designed to implement a uniform federal policy," and the meanings of the concepts important to its application are

"not to be determined according to the law of the forum, but rather require a uniform federal definition." Rosario v. INS, 962 F.2d 220, 223-24 (2nd Cir. 1992). "[E]qual protection considerations prohibit the government from treating differently aliens" who have had received youthful offender adjudications "simply because of the origin of the statute under which they were" adjudicated. See Dillingham v. INS, 267 F.3d 996, 1006-07 (9th Cir. 2001) (addressing state statutes similar to the Federal First Offender Act).

An alien's fate should not hinge on the wording of a state's youthful offender statute when the intent, purpose, and effect of the youthful adjudications are the same. "Fundamental fairness dictates that ... aliens who are in like circumstances, but for irrelevant and fortuitous factors, be treated in like manner." Gerbier, 280 F.3d at 311-12.

Over fifty years ago, the Court articulated the principle of narrow construction as an overall guide to statutory interpretation of the immigration laws, stating that,

> 'We resolve the doubts in favor of that [narrow] construction because deportation is a drastic measure and at times the equivalent of banishment or exile.' It is the

> forfeiture for misconduct of a residence in this country. Such a forfeiture is a penalty. To construe this statutory provision less generously to the alien might find support in logic. But since the stakes are considerable for the individual, we will not assume that Congress meant to trench on his freedom beyond that which is required by the narrowest of several possible meanings of the words used.

Fong Haw Tan v. Phelan, 333 U.S. 6, 10, 68 S. Ct. 374, 376, 92 L. Ed. 433 (1948).

Time and again, the Court returned to this guiding principle, stating that it "would nonetheless be constrained by accepted principles of statutory construction in this area of the law to resolve that doubt in favor of the" alien. Costello v. INS, 376 U.S. 120, 128, 84 S. Ct. 580, 585, 11 L. Ed. 559 (1964).

> [T]he doubt should be resolved in favor of the alien.... We conclude that to give meaning to the statute in light of its humanitarian purpose of preventing the breaking up of families composed in part at least of American citizens, the conflict

between the circuits must be resolved in favor of the aliens.

INS v. Errico, 385 U.S. 214, 225, 87 S. Ct. 473, 480, 17 L. Ed. 2d 318 (1966).

As recently as 2001, the Court turned to the principle of narrow construction, citing the "longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien." INS v. St. Cyr, 533 U.S. 289, 320, 121 S. Ct. 2271, 2290, 150 L. Ed. 2d 347 (2001). When an immigration statute has criminal implications, the Court applies the rule of lenity because the statute must be interpreted consistently in criminal and noncriminal contexts. Leocal, 125 S. Ct. at 384 n.8.

The BIA has consistently applied the principle of narrow construction. See Matter of Farias-Mendoza, 21 I. & N. Dec. 269 (BIA 1996); see also Matter of Chartier, 16 I. & N. Dec. 284 (BIA 1977); Matter of G-, 9 I. & N. Dec. 159 (BIA 1960).

The principles of uniform application of the immigration laws, equal protection, and narrow construction required the Sixth Circuit to resolve any doubts regarding the definition of "conviction" in favor of Mr. Uritsky.

CONCLUSION

Petitioner respectfully submits that the Sixth Circuit erred in the following respects:

- Petitioner's assignment to youthful trainee status under Michigan's Holmes Youthful Trainee Act is not a conviction under 8 U.S.C. § 1101(a)(48)(A).
- Petitioner is not subject to removal as an alien convicted of an aggravated felon under 8 U.S.C. § 1227(a)(2)(A)(iii).
- The Immigration Judge properly terminated the removal proceedings instituted against Petitioner.

Therefore, Petitioner respectfully prays that the Court grant his petition for writ of certiorari, reverse the decisions of the Sixth Circuit Court of Appeals and the BIA, and terminate the removal proceedings instituted against him.

Respectfully Submitted,

Marshal E. Hyman
Counsel of Record
Russell Reid Abrutyn

Table of Appendix Contents

U.S. COURT OF APPEALS, SIXTH CIRCUIT:

Opinion,
filed 03/07/05 ..... A1-A15

U.S. DEPARTMENT OF JUSTICE:

Decision,
filed 10/06/03 ..... B1-B6

U.S. IMMIGRATION COURT:

Order,
filed 04/03/03 ..... C1-C4

United States Court of Appeals,
Sixth Circuit.

Alexander Grigorievich URITSKY, Petitioner,

v.

Alberto GONZALES, Attorney General, Respondent.

No. 03-4331.

Argued: Feb. 2, 2005.

Decided and Filed: March 7, 2005.

Background: Alien appealed from order of the Board of Immigration Appeals (BIA) that ordered him removed from the United States.

Holding: The Court of Appeals, Alan E. Norris, Circuit Judge, held that alien's plea of guilty to third degree sexual conduct constituted a "conviction" under the Immigration and Nationality Act (INA) subjecting alien to removal, notwithstanding alien's designation and sentencing as a youthful trainee under Michigan's Youthful Trainee Act (YTA).

Affirmed.

West Headnotes

[1] KeyCite Notes

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k213 Extrinsic Aids to Construction
361k219 Executive Construction
361k219(6) Particular Federal Statutes
361k219(6.1) k. In General. Most Cited Cases

To the extent that an appeal from a determination of the Board of Immigration Appeals (BIA) involved statutory

construction of the Immigration and Nationality Act (INA), the appellate court would accord the Department of Homeland Security deference. Immigration and Nationality Act, § 101 et seq., 8 U.S.C.A. § 1101 et seq.

[2] KeyCite Notes

⇨24 Aliens
⇦⇨24III Immigration
⇦⇨24k52 Detention, Supervision and Deportation
⇦⇨24k53.2 Crime and Immorality
⇦⇨24k53.2(3) k. Number and Nature of Prosecutions or Punishment; Clemency or Recommendation Against Deportation. Most Cited Cases

Alien's plea of guilty to third degree sexual conduct constituted a "conviction" under the Immigration and Nationality Act (INA) subjecting alien to removal, notwithstanding alien's designation and sentencing as a youthful trainee under Michigan's Youthful Trainee Act. Immigration and Nationality Act, § 101(a)(48)(A), 8 U.S.C.A. § 1101(a)(48)(A); M.C.L.A. §§ 750.520d(1)(a), 762.11.

[3] KeyCite Notes

⇨24 Aliens
⇦⇨24III Immigration
⇦⇨24k52 Detention, Supervision and Deportation
⇦⇨24k53.2 Crime and Immorality
⇦⇨24k53.2(3) k. Number and Nature of Prosecutions or Punishment; Clemency or Recommendation Against Deportation. Most Cited Cases

⇦92 Constitutional Law KeyCite Notes

⇦92XI Equal Protection of Laws

⇦92k250.5 k. Other Regulations. Most Cited Cases

Board of Immigration Appeals' (BIA) finding that alien's plea of guilty to third degree sexual conduct constituted a "conviction" under the Immigration and Nationality Act (INA) subjecting alien to removal, even though alien had been designated and sentenced as a youthful trainee under Michigan law, did not violate alien's equal protection rights; Michigan law was rationally distinguishable from New York juvenile delinquency law, which had been held to not constitute a conviction under the INA, given that adjudications made pursuant to the Michigan's Youthful Trainee law were revocable adjudications, but findings of delinquency under New York law conveyed an irrevocable status. U.S.C.A. Const.Amend. 5; Immigration and Nationality Act, § 101(a)(48)(A), 8 U.S.C.A. § 1101(a)(48)(A); M.C.L.A. §§ 750.520d(1)(a), 762.11.

[4] KeyCite Notes

⇦92 Constitutional Law

⇦92XI Equal Protection of Laws

⇦92k213.1 Bases for Discrimination Affected in General

⇦92k213.1(2) k. Rational or Reasonable Basis; Relation to Object or Compelling Interest. Most Cited Cases

Under rational basis scrutiny for equal protection violation, a statute is accorded a strong presumption of validity and will be upheld if any reasonably conceivable state of facts could demonstrate that the statute is rationally related to a legitimate government purpose. U.S.C.A. Const.Amend. 5.

***728 ARGUED:** Richard A. Kulics, Immigration Law Center, Birmingham, Michigan, ***729** for Petitioner. Norah Ascoli Schwarz, United States Department of Justice,

Washington, D.C., for Respondent. **ON BRIEF:** Richard A. Kulics, Immigration Law Center, Birmingham, Michigan, for Petitioner. Linda S. Wendtland, Michelle Thresher, United States Department of Justice, Washington, D.C., for Respondent.

Before: NORRIS and GIBBONS, Circuit Judges; TODD, Chief District Judge. [FN*]

FN* The Honorable James D. Todd, Chief United States District Judge for the Western District of Tennessee, sitting by designation.

OPINION

ALAN E. NORRIS, Circuit Judge.

Alexander Grigorievich **Uritsky** contests a decision of the Board of Immigration Appeals ("Board") that ordered him removed from the United States. In 2002, **Uritsky** pleaded guilty to one count of third degree sexual conduct in violation of Mich. Comp. Laws § 750.520d(1)(a). He received a sentence of probation and a designation of "youthful trainee" under Michigan's Holmes Youthful Trainee Act ("YTA"), Mich. Comp. Laws §§ 762.11-16. Despite his designation as a "youthful trainee," we conclude that **Uritsky's** "conviction" counts as an aggravated felony as defined by § 101(a)(48)(A) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1101(a)(48)(A), and he therefore is subject to removal.

I.

Uritsky is a native of Ukraine and a citizen of Israel. He entered the United States in 1996 as an eleven year-old, non-immigrant and became a lawful permanent resident on January 4, 2002. When he was seventeen, **Uritsky** had intercourse with a girl of fourteen. He subsequently pleaded guilty to third degree sexual conduct, Mich. Comp. Laws § 750.520d(1)(a), which prohibits sexual penetration of another person who is between thirteen and sixteen years old. Under Michigan law, the maximum sentence for this offense is fifteen years of imprisonment. Mich. Comp. Laws

§ 750.520d(2).
Judgment against **Uritsky** was entered on September 24, 2002, and included two years of probation, fines, and costs. The judgment also provided that "[n]o judgment of conviction is entered. The defendant is assigned to youthful trainee status[.]"
Because of this conviction the Department of Homeland Security ("DHS") served **Uritsky** with a Notice to Appear on November 2, 2002, which charged him with "removability" on the ground that he committed an aggravated felony offense. The INA provides, "Any alien who is convicted of an aggravated felony at any time after admission is deportable." 8 U.S.C. § 1227(a)(2)(A)(iii). Among other things, the INA defines "aggravated felony" as "murder, rape, or sexual abuse of a minor." 8 U.S.C. § 1101(a)(43)(A). The same section of the INA defines "conviction" as follows:
The term "conviction" means, with respect to an alien, a formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where -
(i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and
730 **(ii)** the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed.
8 U.S.C. § 1101(a)(48)(A).
In response to the Notice to Appear, **Uritsky** filed a motion to terminate the proceedings, reasoning that his adjudication as a youthful trainee did not constitute an aggravated felony conviction as defined by the INA. The YTA provides that "if an individual pleads guilty to a criminal offense, committed on or after the individual's seventeenth birthday but before his or her twenty-first birthday, the court of record having jurisdiction of the criminal offense may, without entering a judgment of conviction and with the consent of that individual, consider and assign that individual to the status of youthful trainee." Mich. Comp. Laws § 762.11(1). Further, "If consideration of an individual as a youthful trainee is not terminated and the status of youthful trainee is not revoked as provided in section 12 of this chapter, upon final release of the

individual from the status as youthful trainee, the court shall discharge the individual and dismiss the proceedings." Mich. Comp. Laws § 762.14(1) (footnote omitted). Moreover, "An assignment of an individual to the status of youthful trainee as provided in this chapter is not a conviction for a crime and ... the individual assigned to the status of youthful trainee shall not suffer a civil disability or loss of right or privilege following his or her release from that status because of his or her assignment as a youthful trainee." Mich. Comp. Laws § 762.14(2).

In addition to the language of the YTA, **Uritsky** relied upon an opinion of the Board, *In re Miguel Devison-Charles* ("*Devison* "), 22 I & N Dec. 1362, 2000 WL 1470461 (BIA 2000), to support his view that he had not committed the aggravated felony required by the INA to trigger removal. In *Devison,* the Board considered whether an adjudication as a "youthful offender" under the New York criminal code could nonetheless constitute an aggravated felony conviction as defined by the INA. The Board compared the New York scheme to the Federal Juvenile Delinquency Act ("FJDA"), 18 U.S.C. §§ 5031-42, and concluded, "[T]he New York procedure under which the respondent was adjudicated a youthful offender ... is sufficiently analogous to the procedure under the FJDA to classify that adjudication as a determination of delinquency, rather than as a conviction for a crime." *Devison* at 1367. In its reasoning, the Board drew a critical distinction between a finding of delinquency, which involves "status" rather than guilt or innocence, and deferred adjudication or expungement. *Id.* at 1371. Deferred adjudications constitute convictions under the INA while findings of delinquency do not:

[J]uvenile delinquency and youthful offender adjudications are not akin to expungement or deferred adjudication procedures. Under the former, proceedings are civil in nature and the adjudication of a person determined to be a juvenile delinquent or youthful offender is not a conviction ab initio, nor can it ripen into a conviction at a later date. In the case of an expungement or deferred adjudication, the judgment in the criminal proceeding either starts out as a "conviction" that can be "expunged" upon satisfactory

completion of terms of punishment and petition to the court, or as a judgment that is deferred pending similar satisfaction of conditions of punishment. In either case, however, neither expungement nor deferral can be presumed, and the original judgment of guilt may remain, or ripen into, a "conviction" under state law. This is a dispositive difference, because a juvenile adjudication cannot become a conviction ***731** based on the occurrence or nonoccurrence of subsequent events. To eliminate these distinctions and overrule our well- established precedents on these issues, we would require clearer direction from Congress that it intended juvenile adjudications to be treated as convictions for immigration purposes.
Id. at 1371-72 (footnote omitted). In short, the instant case requires us to determine whether the Michigan YTA is closer to a deferred adjudication, in which case **Uritsky** is subject to removal, or to a finding of delinquency.
The immigration judge determined that the Michigan scheme constituted a finding of delinquency as defined by *Devison* and terminated proceedings. The Board reversed based on the following rationale:
We agree with the DHS that the respondent has been convicted for immigration purposes. In *Matter of Devison, supra,* we found that an adjudication of youthful offender status pursuant to N.Y.Crim. Pro. Law § 720 does not constitute a conviction under section 101(a)(48)(A) of the Act because it is analogous to a determination of juvenile delinquency under the Federal Juvenile Delinquency Act, 18 U.S.C. §§ 50131-5042 ("FJDA"), in several ways, the most notable being that, once an individual is determined to be a youthful offender under New York law, his or her conviction is vacated. Because the vacation of the conviction does not depend on the individual's future good behavior, we found that the adjudication is not an expungement or other rehabilitative act. Moreover, we concluded that a youthful offender adjudication does not, in fact, fit within the scope of the definition of the term "conviction" contained in section 101(a)(48)(A) of the Act.
In the present case, the respondent was sentenced as a youthful trainee under MCL § 762.11 et seq. for his offense of criminal sexual conduct in the third degree. The

respondent claims that MCL § 762.11 is analogous to the FJDA and New York law, but we disagree. As the DHS has explained, a criminal action against an individual is not completely vacated under Michigan law until an individual completes his or her probation or sentence. And a judge may revoke the youthful trainee status at any time. These distinctions between the Michigan youthful trainee program and the FJDA are significant and make the Michigan program more analogous to a rehabilitative expungement than an adjudication of juvenile delinquency. We therefore agree with the DHS that the grant of youthful trainee status in the respondent's case qualifies as a conviction under section 101(a)(48)(A) of the Act.

Decision of the Board of Immigration Appeals, Oct. 6, 2003 at 2 (citations omitted). The Board ordered **Uritsky** removed from the United States but remanded the matter to allow him to choose a country for removal.

II.

Standard of Review

[1] To the extent that this appeal involves statutory construction of the INA, we accord the DHS deference. *INS v. Aguirre-Aguirre*, 526 U.S. 415, 424-25, 119 S.Ct. 1439, 143 L.Ed.2d 590 (1999). In *Aguirre-Aguirre*, the Court reviewed the manner in which the agency construed the INA's definition of the term "serious nonpolitical crime." In reaching its decision, the Court faulted the Ninth Circuit, which had reversed the Board, for not according the Board the proper deference in construing the INA:

Because the Court of Appeals confronted questions implicating "an agency's construction of the statute which it administers," ***732** the court should have applied the principles of deference described in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). Thus, the court should have asked whether "the statute is silent or ambiguous with respect to the specific issue" before it; if so, "the question for the court [was] whether the agency's answer is based on a permissible construction of the statute." *Id.*, at 843, 104 S.Ct. 2778. *See also INS v.*

Cardoza-Fonseca, 480 U.S. [421], at 448-449, 107 S.Ct. 1207 [94 L.Ed.2d 434].

It is clear that principles of *Chevron* deference are applicable to this statutory scheme. The INA provides that "[t]he Attorney General shall be charged with the administration and enforcement" of the statute and that the "determination and ruling by the Attorney General with respect to all questions of law shall be controlling." 8 U.S.C. § 1103(a)(1) (1994 ed., Supp. III). Section 1253(h), moreover, in express terms confers decisionmaking authority on the Attorney General, making an alien's entitlement to withholding turn on the Attorney General's "determin[ation]" whether the statutory conditions for withholding have been met. 8 U.S.C. §§ 1253(h)(1), (2). In addition, we have recognized that judicial deference to the Executive Branch is especially appropriate in the immigration context where officials "exercise especially sensitive political functions that implicate questions of foreign relations." *INS v. Abudu*, 485 U.S. 94, 110, 108 S.Ct. 904, 99 L.Ed.2d 90 (1988).

Aguirre-Aguirre, 526 U.S. at 424-25, 119 S.Ct. 1439. With this admonition in mind, we turn to the sections of the INA crucial to this appeal.

Evolution of the Term "Conviction" in the Immigration Context

The statutory definition of conviction found at 8 U.S.C. § 1101(a)(48)(A) was added to the INA in 1996. Before that, the Board had attempted to provide a uniform definition of the term in *Matter of Ozkok*, 19 I & N Dec. 546, 1988 WL 235459 (BIA 1988). In *Ozkok*, the Board surveyed its struggle to determine "what state action constitutes a conviction with sufficient finality for purposes of the immigration laws." *Id.* at 548. After observing that "most states now employ some method of ameliorating the consequences of a conviction," including some that apply only to youthful offenders, the Board concluded that it was irrational to treat aliens differently simply because of slight differences among the criminal codes of the various states. *Id.* at 550-51. It therefore proposed the following definition for those aliens who have been subject to criminal proceedings but who have yet to have a formal judgment of

guilt entered against them:
Where adjudication of guilt has been withheld ... further examination of the specific procedure used and the state authority under which the court acted will be necessary. As a general rule, a conviction will be found for immigration purposes where all of the following elements are present:
(1) a judge or jury has found the alien guilty or he has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilty;
(2) the judge has ordered some form of punishment, penalty, or restraint on the person's liberty to be imposed (including but not limited to incarceration, probation, a fine or restitution, or community-based sanctions such as a rehabilitation program, a work-release ***733** or study-release program, revocation or suspension of a driver's license, deprivation of nonessential activities or privileges, or community service); and
(3) a judgment or adjudication of guilt may be entered if the person violates the terms of his probation or fails to comply with the requirements of the court's order, without availability of further proceedings regarding the person's guilt or innocence of the original charge.
Id. at 551-52 (footnote omitted).
Congress amended the INA significantly with the passage of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996. The House Conference Report, H.R. Conf. Rep. 104-828 (1996), provides the following reasoning for modifying the definition of conviction articulated in *Matter of Ozkok:*
This section deliberately broadens the scope of the definition of "conviction" beyond that adopted by the Board of Immigration Appeals in *Matter of Ozkok,* 19 I & N Dec. 546 (BIA 1988). As the Board noted in *Ozkok,* there exist in the various States a myriad of provisions for ameliorating the effects of a conviction. As a result, aliens who have clearly been guilty of criminal behavior and whom Congress intended to be considered "convicted" have escaped the immigration consequences normally attendant upon a conviction. *Ozkok,* while making it more difficult for alien criminals to escape such consequences, does not go far enough to address situations where a judgment of guilt or

imposition of sentence is suspended, conditioned upon the alien's future good behavior. For example, the third prong of *Ozkok* requires that a judgment or adjudication of guilt may be entered if the alien violates a term or condition of probation, without the need for any further proceedings regarding guilt or innocence on the original charge. In some States, adjudication may be "deferred" upon a finding or confession of guilt, and a final judgment of guilt may not be imposed if the alien violates probation until there is an additional proceeding regarding the alien's guilt or innocence. In such cases, the third prong of the *Ozkok* definition prevents the original finding or confession of guilt to be considered a "conviction" for deportation purposes. *This new provision, by removing the third prong of* Ozkok, *clarifies Congressional intent that even in cases where adjudication is "deferred," the original finding or confession of guilt is sufficient to establish a "conviction" for purposes of the immigration laws.* In addition, this new definition clarifies that in cases where immigration consequences attach depending upon the length of a term of sentence, any court-ordered sentence is considered to be "actually imposed," including where the court has suspended the imposition of the sentence. The purpose of this provision is to overturn current administrative rulings holding that a sentence is not "actually imposed" in such cases. *Id.* at 224 ("Joint Explanatory Statement") (emphasis added).

This new definition was construed shortly after its enactment by an en banc panel of the Board. *In re Mauro Roldan-Santoyo ("Roldan")*, 22 I & N Dec. 512, 1999 WL 126433 (BIA 1999). The Board took a restrictive view of how an expungement affects whether an alien was "convicted" as defined by 8 U.S.C. § 1101(a)(48)(A):

We ... find it significant that, under the new definition, an alien is considered convicted for immigration purposes despite the fact that further proceedings addressing the merits of the original ***734** charge might be required before the state would consider him convicted. It would be incongruous for us to interpret the definition to allow an alien, who during the entire period of his probation would have been considered convicted for immigration purposes,

to be relieved of the immigration consequences of his misconduct as of the date of a subsequent rehabilitative state action having absolutely no relation to the merits of the charge. Congress has focused on the original determination of guilt and has expressed clear disinterest regarding subsequent state rehabilitative measures. We therefore interpret the new definition to provide that an alien is considered convicted for immigration purposes upon the initial satisfaction of the requirements of section 101(a)(48)(A) of the Act, and that he remains convicted notwithstanding a subsequent state action purporting to erase all evidence of the original determination of guilt through a rehabilitative procedure.

Id. at 523.

After *Roldan,* however, the Board decided *Devison, supra,* and carved out the distinction already discussed: while deferred adjudications, such as an expungement, remain convictions even though they might apply to youthful offenders, findings of delinquency do not because they assign the offender a particular status that cannot be revoked. *Devison* at 1371-72.

Application of the Definition to ***Uritsky***

[2] The Michigan YTA permits trial courts to assign individuals between the ages of 17 and 20 who plead guilty to a criminal offense to youthful trainee status. Mich. Comp. Laws § 762.11. In such cases, the trial court does not enter a judgment of conviction. However, while the individual is serving his probationary sentence as a youthful trainee, the court retains discretion to "revoke that status at any time ... [and] enter an adjudication of guilt and proceed as provided by law." Mich. Comp. Laws § 762.12. Further, "If the status of youthful trainee is revoked, an adjudication of guilt is entered, and a sentence is imposed ...." *Id.* Assuming that the probationary period is served without incident, "upon final release of the individual from the status of youthful trainee, the court shall discharge the individual and dismiss the proceedings." Mich. Comp. Laws § 762.14(1).

Uritsky argues that the only difference between the New

York statute construed by *Devison* and the Michigan YTA is that the latter permits revocation of youthful trainee status while the former does not. However, both statutes deal with the same age group, reflect a similar legislative intent to give young offenders a second chance to avoid the stigma of criminal conviction, and promote rehabilitation over punishment. According to **Uritsky,** this procedural difference is not enough to justify varying applications of the INA based solely on one's state of residence. Because the Board failed to articulate a rational basis for such disparate application, **Uritsky** continues, its order of removal violated his right to equal protection and must be vacated.

We are not unsympathetic to **Uritsky's** position. The two statutes evince a similar underlying purpose and the distinction drawn by the Board may seem to some to be less than compelling, particularly in light of the serious consequences that potentially flow from the distinction: in this case, the removal of **Uritsky** from the United States. Bearing in mind that we must accord *Chevron* deference to the DHS's construction of the statute, we start our inquiry with reference to the plain language of the INA, specifically its definition of "conviction." First, the alien must have "entered ***735** a plea of guilty" as **Uritsky** did to the charge of third degree sexual conduct. 8 U.S.C. § 1101(a)(48)(A)(i). Second, the court must have imposed "some form of punishment, penalty, or restraint on the alien's liberty[.]" 8 U.S.C. § 1101(a)(48)(A)(ii). **Uritsky's** plea and disposition under the YTA satisfies both requirements. *See Gill v. Ashcroft*, 335 F.3d 574, 576 (7th Cir.2003) ("Gill's plea of guilty satisfies part (i) of this definition, and the term of probation satisfies part (ii)"). Furthermore, the Board's reasoning in *Devison, supra,* reflected Congressional intent with respect to juvenile adjudications and the INA. The Board accepted the longstanding view that juvenile delinquency proceedings are not criminal proceedings for immigration purposes. *Devison* at 1365. However, the Board also recognized that there is an intermediate realm between juvenile proceedings, which typically apply to offenders sixteen years old or younger, and "youthful offender adjudications,"

which affect those who commit crimes between ages seventeen and twenty. When determining whether youthful offender adjudications in New York represent "convictions" under the INA, the Board reasonably compared the New York statute to its federal counterpart. Relying upon the distinctions drawn in *Roldan, supra,* it concluded that Congress, in enacting 8 U.S.C. § 1101(a)(48)(A), did not intend to bring findings of juvenile delinquency under the definition of "conviction," but did intend that proceedings akin to expungement or deferred adjudications should count. *Devison* at 1371-72. This distinction has been endorsed by other circuits. *See, e.g., Acosta v. Ashcroft,* 341 F.3d 218, 223 (3d Cir.2003) (offender "convicted" even when charges ultimately dismissed without an adjudication of guilt after successful completion of probation).
Turning to the instant case, the Board's decision represented a reasonable application of *Devison* and *Roldan* to the Michigan YTA. Assuming that the distinction between revocable adjudications, such as those made pursuant to the YTA, and irrevocable "status" findings of delinquency is valid, the Board's conclusion that youthful trainee designations in Michigan represent convictions for immigration purposes represents the kind of "permissible construction" of the INA sanctioned by *Chevron.*

[3] [4] Because the Michigan statute can be distinguished from its New York and federal counterparts, **Uritsky's** equal protection claim fails. The distinction drawn by the Board has a "rational basis," which is all that is required for it to pass constitutional muster. *Ashki v. INS,* 233 F.3d 913, 920 (6th Cir.2000). "Under rational basis scrutiny, a statute is 'accorded a strong presumption of validity' and will be upheld if 'any reasonably conceivable state of facts' could demonstrate that the statute is rationally related to a legitimate government purpose." *Id.* (citing *Heller v. Doe,* 509 U.S. 312, 319-20, 113 S.Ct. 2637, 125 L.Ed.2d 257 (1993)). Simply because states take different approaches to criminal sanctions does not mean that the Board must construe "conviction" in the broadest possible manner in order to avoid claims of equal

protection.
For these reasons, we hold that, despite **Uritsky's** designation as a "youthful trainee," his plea of guilty to third degree sexual conduct constitutes a "conviction" as that term is defined by the INA.

***736 III.**

The Order of the Board dated October 3, 2003 is **affirmed.**
C.A.6,2005.
Uritsky v. Gonzales
399 F.3d 728, 2005 Fed.App. 0108P

Briefs and Other Related Documents **(Back to top)**

- 03-4331 (Docket) (Oct. 15, 2003)

END OF DOCUMENT

U.S. Department of Justice
Executive Office for Immigration Review
Falls Church, Virginia 22041

File: A78 *652* 707 - Detroit Date: Oct. 06, 2003

In re: ALEXANDER GRIGORIEVICH URITSKY

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Richard Kulics, Esquire

ON BEHALF OF DHS: Kathleen L. Alconrn
Assistant Chief Counsel

CHARGE:

Notice: Sec. 237(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(iii)]
Convicted of aggravated felony

237(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(iii)]
Convicted of aggravated felony[1]

[1] The Department of Homeland Security (the "DHS," formerly the Immigration and Naturalization Service) has charged the respondent with removability as an alien convicted both under a law relating to sexual abuse of a minor and a law relating to rape. The DHS therefore included two charges under section 237(a)(2)(A)(iii) of the Immigration and Nationality Act, 8 U.S.C. § 1 227(a)(2)(A)(iii) in the Notice to Appear.

APPLICATION: Termination

On April 3, 2003, an Immigration Judge found that the respondent had not been convicted for immigration purposes and terminated the removal proceedings against him. The Department of Homeland Security, (the "DHS," formerly the Immigration and Naturalization Service) has appealed from this decision. The appeal will be sustained, and the respondent will be ordered removed from the United States. The record will be remanded for the limited purpose of allowing the respondent to designate a country of removal.

I. BACKGROUND

The respondent is a native of Ukraine and a citizen of Israel. He entered the United States in 1996 as a nonimmigrant and adjusted his status to that of a lawful permanent resident on January 4, 2002. On September 24, 2002, he was convicted of criminal sexual conduct in the third degree. The DHS charged him with removability on the basis of this crime. The Immigration Judge, however, found that because the respondent had been granted youthful trainee status under Michigan law, he did not have a "conviction" for the purposes of section l01(a)(48)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1101 (a)(48)(A). The Immigration Judge therefore determined that the respondent was not removable as charged and terminated the proceedings against him. The DHS has appealed from this decision.

On appeal, the DHS argues that Michigan's procedure for granting youthful trainee status is not analogous to the procedure for making a finding of delinquency under the Federal Juvenile Delinquency Act. Specifically, the DHS maintains that a judge may rescind youthful trainee status at any time before the completion of the probation or sentence imposed and enter a criminal conviction. In addition, an individual must successfully complete probation before his or her conviction is eliminated. Given these facts, the DHS contends that youthful trainee status is essentially a rehabilitative expungement rather than a finding of juvenile delinquency. Thus, the DHS claims that our ruling in *Matter of Roldan,* 22 I&N Dec. 512 (BIA 1999) rather than our ruling in *Matter of Devison,* 22 I&n Dec. 1362 (BIA 2001) applies to the respondent's case. And the DHS maintains that, under this precedent, the respondent has been convicted for immigration purposes and is removable as charged.

II. CONVICTION UNDER SECTION 101(a)(48)(A) OF THE ACT

We agree with the DHS that the respondent has been convicted for immigration purposes. In *Matter of Devison, supra,* we found that an adjudication of youthful offender status pursuant to N.Y. Crim. Pro. Law § 720 does not constitute a conviction under section 10l(a)(48)(A) of the Act because it is analogous to a determination of juvenile delinquency under the Federal Juvenile Delinquency Act, 18 U.S.C. §§ 503 1-5042 (1994 & Supp. 111996) ("FJDA"), in several ways, the most notable being that, once an individual is determined to be a youthful offender under New York law, his or her conviction is vacated.

Because the vacation of the conviction does not depend on the individual's future good behavior, we found that the adjudication is not an expungement or other rehabilitative act. *Matter of Devison, supra,* at 1371-2, 1376-77. Moreover, we concluded that a youthful offender adjudication does not, in fact, fit within the scope of the definition of the term "conviction" contained in section 10l(a)(48)(A) of the Act. *Id.*

In the present case, the respondent was sentenced as a youthful trainee under MCL § 762.11 et seq. for his offense of criminal sexual conduct in the third degree. The respondent claims that MCL § 762.11 is analogous to the FJDA and New York law, but we disagree. As the DHS has explained, a criminal action against an individual is not completely vacated under Michigan law until an individual completes his or her probation or sentence. *See* MCL § 762.14. And a judge may revoke the youthful trainee status at any time. *See* MCL § 76212. These distinctions between the Michigan youthful trainee program and the FJDA are significant and make the Michigan program more analogous to a rehabilitative expungement than an adjudication of juvenile delinquency. *See Matter of Devison, supra,* at 1371-2, 1376-77. We therefore agree with the DHS that the grant of youthful trainee status in the respondent's case qualifies as a conviction under section 1 01(a)(48)(A) of the Act.

III. AGGRAVATED FELONY UNDER SECTION 101(a)(43)(A) OF THE ACT

In addition, we find that the respondent's offense qualifies as sexual abuse of a minor for the purposes of section 101 (a)(43)(A) of the Act. The respondent was

convicted under MCL § 750.52(d)(1). According to this provision, a person is guilty of criminal sexual conduct in the third degree if the person engages in sexual penetration with another person and that other person is at least 13 years of age and under 16 years of age. This offense, by its terms, qualifies as "sexual abuse of a minor" for the purposes of section 1101(a)(43)(A) of the Act. *See Matter of Rodriguez-Rodriguez,* 22 I&N Dec. 991 (BIA 1999) (finding that "sexual abuse of a minor" includes "the employment, use, persuasion, inducement, enticement or coercion of a child to engage in, or assist another person to engage in sexually explicit conduct"); *Cf United States v. Pereira-Salmeron,* 337 F.3d 1148, 1154-5 (5th Cir. 2003) (finding that conviction for carnal knowledge of a child constituted sexual abuse of a minor); *United States v. Vargas-Garnica,* 332 F.3d 471, 474 (7th Cir. 2003) (finding that statutory rape constitutes sexual abuse of a minor); *Mugalli v. Ashcrofi,* 258 F.3d *52,* 60-61 (2nd Cir. 2001) (finding that Board acted properly in finding New York equivalent of statutory rape to be sexual abuse of a minor). And the fact that the respondent was less than 4 years older than the victim does not change this fact, despite the respondent's arguments to the contrary. *See Matter of Rodriguez-Rodriguez, supra* at 996 (finding that the definition of "sexual abuse of a minor" in 18 U;S.C. § 2242 is too restrictive to encompass the numerous state crimes that can be viewed as sexual abuse).

Based on the foregoing, we find that the respondent is removable as charged. We therefore sustain the DHS' s appeal and we reverse the Immigration Judge's decision to terminate proceedings. In addition, because we find no information to suggest that the respondent is eligible for any form of relief from removal, we order him removed

from the United States. Nevertheless, because the Immigration Judge does not appear to have afforded the respondent an opportunity to designate a country of removal at his hearing, we must remand the respondent's case to the Immigration Judge for this limited purpose. *See* Section 241(b)(2)(A) of the Act, 8 U.S.C. § 1231(b)(2)(A); 8 C.F.R. § 1240.1 0(f)(stating that the Immigration Judge "shall afford" the alien the opportunity to designate a country of removal).

ORDER: The DHS's appeal is sustained.

FURTHER ORDER: The respondent is ordered removed from the United States.

FURTHER ORDER: The record is remanded to the Immigration Judge for the limited purpose of allowing the respondent an opportunity to designate a country of removal.

/s/ Frederick D. Hess

FOR THE BOARD

IMMIGRATION COURT
1155 BREWERY PARK BLVD, STE 450
DETROIT, MI 48207

In the Matter of Case No: A78-652-707

URITSKY, ALEXANDER GRIGORIEVICH

Respondent IN REMOVAL PROCEEDINGS

ORDER OF THE IMMIGRATION JUDGE

This is a summary of the oral decision entered on 3 April 2003

This memorandum is solely for the convenience of the parties. If the proceedings should be appealed or reopened, the oral decision will become the official opinion in the case.

[ ] The respondent was ordered removed from the United States to or in the alternative to

[ ] Respondent's application for voluntary departure was denied and respondent was ordered removed to alternative to

[ ] Respondent's application for voluntary departure was granted until _____ upon posting a bond in the amount of $ _____ with an alternate order of removal to

[ ] Respondent's application for asylum was ( )granted ( ) denied ( ) withdrawn

[ ] Respondent's application for withholding of removal was ( )granted ( ) denied ( ) withdrawn

[ ] Respondent's application for cancellation of removal under section 240A(a) was( ) granted ( ) denied ( ) withdrawn

[ ] Respondent's application for cancellation of removal was ( )granted under section 240A(b)(1) ( ) granted under section 240A(b)(2) ( )denied ( ) withdrawn. If granted, it was ordered that the respondent be issued all appropriate documents necessary to give effect to this order.

[ ] Respondent's application for a waiver under section _____ of the INA was ( ) granted ( ) denied ( ) withdrawn or ( ) other.

[ ] Respondent's application for adjustment of status under section _____ of the INA was ( )granted ( ) denied ( )withdrawn. If granted, it was ordered that respondent he issued all appropriate documents necessary to give effect to this order.

[ ] Respondent's status was rescinded under section 246.

[ ] Respondent is admitted to the United States as a _____ until _____.

[ ] As a condition of admission, respondent is to post a $ _____ bond.

[ ] Respondent knowingly filed a frivolous asylum application after proper notice.

[ ] Respondent was advised of the limitation on discretionary relief for failure to appear as ordered in the Immigration Judge's oral decision.

[X] Proceedings were terminated,

[ ] Other: _____

Date:
Appeal: Waived/Reserved (Reserved circled) by Gov't
Appeal due by: May 3, 2003

/s/
TERRY C. CHRISTIAN
Immigration Judge